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# Supreme Court of the United States.

OCTOBER TERM, 1902.

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No. 286.

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JAMES H. McKENNEY,
Clerk.

JOHN M. WARD,

*Appellant,*

*VS.*

MOSES H. SHERMAN and DAVID HARDENBURG.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

## BRIEF FOR APPELLEES MOSES H. SHERMAN AND DAVID HARDENBURG.

C. F. AINSWORTH,

*Attorney for Appellees.*

The Arizona Republican, Phoenix.

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# Supreme Court of the United States

OCTOBER TERM, 1902.

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| JOHN M. WARD, Appellant, vs. MOSES H. SHERMAN and DAVID HARDENBURG. | Appeal from the Supreme Court of the Territory of Arizona. |

## BRIEF FOR APPELLEES, MOSES H. SHERMAN AND DAVID HARDENBURG.

### STATEMENT OF THE CASE.

This is an appeal from the judgment of the Supreme Court of the Territory of Arizona affirming the judgment of the District Court of the Third Judicial District of said Territory. The Supreme Court of Arizona affirmed the judgment of the said District Court for the reason that the assignment of errors did not conform to the requirements of the statutes of Arizona nor to the court rules of the court, and were considered by that court as no assignments whatever.

It is the contention of the appellees that the only matter brought here for review is the decision of the Supreme Court of the Territory of Arizona as to the construction of the Territorial statute and its rules of court on pure questions of practice before the Supreme Court of the Territory of Arizona, which decision is as follows: (Record pages 88 and 89.)

In the Supreme Court of the Territory of Arizona.

John M. Ward, Appellant,

vs. —No. 746. Opinion.

Moses H. Sherman, Appellee.

Appeal from District Court, Maricopa County; Webster Street, Judge.

Kibbey & Edwards for appellant.

C. F. Ainsworth, Frank Cox and C. N. Sterry, for appellee.

*Per curiam:* The brief of the appellant in this case contains the following assignment of errors: "(1.) The Court erred in admitting evidence adduced by the defendant. (2.) The Court erred in rejecting evidence offered by the plaintiff. (3.) The evidence does not sustain the judgment, findings or verdict of the Court. (4.) The evidence does not sustain the findings of the Court. (5.) The judgment of the Court is contrary to the law. (6.) The judgment of the Court is contrary to the evidence." The rules of this court (rule 3) require "a specification of

the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. * * * * When the error alleged is to the finding of the Court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding." It is further prescribed (rule 6) that "all assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. * * * * An objection to the ruling or action of the court below, will be deemed waived here, unless it has been assigned as error, in the manner above provided."

There is objection made by counsel for the appellee to the consideration of the assignment of errors in this case, on the ground that the same does not conform to the requirement of the statute and the rules of the court. The objection is well founded. The errors assigned are but general and indefinite. They point us to nothing specific, and utterly fail to comply with the express provision of our rules. This court is an appellate one, and the prime object of these rules is the designation of specified errors, in order that the court and opposite counsel may be clearly informed of what particular ruling or action below is relied upon for the reversal or modification of the judgment. An assignment which does not distinctly point out these matters—one which compels the court and the

counsel to look further and to search the brief and record in order to discover them—entirely fails to accomplish the purpose of its being. Not one of the errors here alleged is sufficiently specific to be entitled to consideration. General assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this Court, and likewise by other courts operating under similar rules. Newmark et al. vs. Marks (Ariz.), 28 Pac. 960; Christy vs. Arnold (Ariz.), 36 Pac. 918; Main vs. Main (Ariz.), 60 Pac. 888; Treat vs. Jemison, 20 Wall. 652; United States vs. Indian Grave Drainage Dist., 85 Fed. 928; Louisiana A. & M. R. R. Co., vs. B'd Levee Com'rs, 87 Fed. 594; Chandler vs. Pomeroy, 96 Fed. 156; Percy Consol. Min. Co. vs. Hallam (Col.), 44 Pac. 509; Schofield vs. Territory (N. M.), 56 Pac. 306. The rules relating to assignments and specifications of error have been so long in force, and we have so often decided that a failure to make proper assignments amounts to a waiver of all errors which are not fundamental, that it would seem there should be no longer occasion for disregard of these plain requirements. In the absence of any assignment of error in this case, and none appearing upon the face of the record, the judgment must be affirmed.

GEO. R. DAVIS, A. J.
RICHARD E. SLOAN, A. J.
FLETCHER M. DOAN, A. J.

## ARGUMENT.

It is now well settled by a long line of decisions of this Court that a judgment or decree of the highest court of a Territory can be reviewed by this Court, upon a writ of error, only on the exceptions or questions of law presented by the record; and upon an appeal, on the rulings of the court below. And this Court has also established the rule that in appeals from a Territorial court, the evidence at large cannot be brought up, but only a statement of facts and the rulings made at the trial and duly excepted to on the admission or rejection of evidence; and that the authority of this Court is limited to determining whether the court's findings of fact support its judgment and decree, and whether there is any error in such rulings, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court.

As was said in the case of Hecht vs. Boughton, reported in 105 U. S. 235, 236, Chief Justice Waite writing the opinion,

"We are not to consider the testimony in any case. Upon a writ of error we are confined

to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive upon us."

This rule as regards the limit of investigation by this Court of matters brought before it on appeal, has been well established by a long line of cases, and we would respectfully call the attention of the Court to several of them wherein this rule has been followed.

Harrison vs. Perea, 168 U. S. 311 on 323.
Idaho & Oregon Land Improvement Co. vs. Bradbury, 132 U. S. 509.
San Pedro etc. Co. vs. United States, 146 U. S. 120.
Haws vs. Victoria Copper Mining Co., 160 U. S. 303.
Jenkins vs. Neff, 186 U. S. on 235.
Stringfellow vs. Cain, 99 U. S. 610.
U. S. vs. Hailey, 118 U. S. 233.
Murphy vs. Ramsey, 114 U. S. 35.

This therefore being the limit of the investigation of this Court upon this appeal, we will take up the matter of the statement of fact certified to by the Supreme Court of the Territory of Arizona, for consideration.

In accordance with the requirements of law, the Supreme Court of the Territory has certified to this Court its statement of facts constituting its findings

of fact in the nature of a special verdict, which is as follows: (Record pages 98, 99 and 100.)

In the Supreme Court of the Territory of Arizona.

John M. Ward, Appellant,

vs

Moses H. Sherman and David Hardenburg,

Appellees.

## STATEMENT OF FACTS.

The above-entitled cause having been argued and submitted to this Court at the January, 1901, term thereof, and the judgment appealed from having been on the 21st day of March, 1901, in all things affirmed by this Court, and a motion for a rehearing having been filed by the appellants, and the same having been overruled, and the appellants desiring to prosecute an appeal to the Supreme Court of the United States from the judgment of this Court in the case, and having applied for the statement of facts in the case in the nature of a special verdict pursuant to acts of congress in such case made and provided.

Now, therefore, this Court on this 19th day of March, 1902, the same being a day of the January term of said court, make and file the following statement of facts, to-wit:

I.

The appellant on the 18th day of Novem-

ber, 1900, filed in the office of the clerk of the Supreme Court of Arizona the record of this cause which included the transcript of "the testimony taken in the case transcriped and certified by the court reporter" as permitted by Section 1 of Act No. 71 of the Laws of 1897, which transcript of the testimony so transcribed and certified is as follows:

(See Reporter's Transcript, pages 74-162.)

During the trial the following exhibits were introduced as evidence by the plaintiff, being Plaintiff's Exhibits A and B.

(For Plaintiff's Exhibit A, see pages 31, 32.)

(For Plaintiff's Exhibit B, see pages 32-35.)

The defendant during the trial of the case, introduced the follows exhibits as evidence:

Exhibit 1. (See pages 36-37.)
Exhibit 2. (See pages 37-38.)
Exhibit 3. (See page 39.)
Exhibit 4. (See pages 40-42.)
Exhibit 5. (See page 42.)

II.

The Court further finds that thereafter the appellant filed in this Court his brief containing the following assignment of errors:

A. The Court erred in admitting evidence adduced by the defendant.

B. The Court erred in rejecting evidence offered by the plaintiff.

C. The evidence does not sustain the judgment, findings and verdict of the Court.

D. The evidence does not sustain the findings of the Court.

E. The judgment of the Court is contrary to law.

F. The judgment of the Court is contrary to the evidence.

III.

The Court further finds that the rule of this Court, being rule 3, subdivision 2, reads as follows:

"A specification of the errors relied upon, particularly and separately stated, setting out each error asserted and intended to be urged. When the error alleged is to be the admission or the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charges of the court, the specifications shall set out the part referred to *totidem verbis* whether it be the instruction given, or to the instruction refusde. When the error alleged is to the finding of a court, the specification shall allege the finding, and a sufficient statement of the evidence that is pertinent thereto as will make clear the reasons for or against the finding."

Rule 6, subdivision- 1 and 3 reads as follows:

"I. All assignments of errors must distinctly specify each ground of error relied upon, and the particular ruling complained of. If the particular ruling complained of has been embodied in a motion for a new trial with other rulings, or in any motion, or in a bill of exceptions, or in a statement of facts, or otherwise

in the record, it must nevertheless be referred to in the assignment of errors, or it will be deemed to be waived.

"III. An objection to the ruling or action of the court below will be deemed waived here, unless it has been assigned as error, in the manner above provided."

IV.

This Court further finds that the appellant in this case has failed to comply with the express provisions of the rules of this Court relating to the assignment of errors, and the errors assigned as above specified are but general and indefinite. That none of the errors here alleged is sufficiently specific to be entitled to consideration by this Court, and in the absence of a proper assignment of the errors in this case and no error appearing upon the face of the record, the judgment of the court below is affirmed.

By the Court, RICHARD E. SLOAN,
Presiding Judge of the Supreme
Court of the Territory of Arizona.

There is therefore brought up for the consideration of this Court simply the question whether, conceding the findings of the Supreme Court of Arizona to be true and in accordance with full and proper weighing of all the facts, the judgment pronounced by the court below (the Supreme Court of the Territory) was proper, or in the language used by this Court in several cases, whether the court's findings of fact support its judgment or decree.

The reasons for the judgment of the Supreme Court of the Territory are fully stated in its opinion and need not here be elaborated upon. As to whether or not the appellant had complied with the rules of the Supreme Court of the Territory was a proper subject of inquiry of the Supreme Court of the Territory. A non-compliance with the rules of the court as regards the proper assignment of errors is in effect the same as a failure to assign any errors at all, and does not call upon the court to delve into all the evidence and testimony and see if the court below in trying the case made any errors or not. It was the duty of the counsel for appellant to properly assign the errors which he desires reviewed by the appellate court, and if he does not do so, he can not complain of the action of the appellate court in affirming the judgment of the court below there being no errors apparent on the record.

Treat vs. Jemison, 20 Wall. 652.
Clement vs. Hearne, 45 Tex. 415.
Maricopa County vs. Jordan, 60 Pac. 693.
Hutton vs. Reed, 25 Cal. 478.
Watson vs. LeGrand ,etc., 177 Ill. 203 (52 N. E. 317.)
Davis vs. Lang, 153 Ill. 175 (38 N. E. 635.)
Supe vs. Francis, 49 Mich. 266.
Pollock vs. Cohen, 32 Ohio St. 514.
Fox vs. Fox, 96 Pa. St. 60.
Findlay vs. Pertz, 74 Fed. 681.

The rule formulated by the Supreme Court of

the Territory of Arizona which is set out in full in the opinion of that court in this case, speaks for itself. It requires that in the submission of matters for review, the errors complained of must be assigned in the manner in said rule specified, which would put the court in a position to recognize the errors complained of, and not cause it to act as counsel for the appellant in the discovery of errors committed by the court below.

As was said by the Supreme Court of the Territory in its opinion, general assignments, substantially in the form here presented, have been condemned and held insufficient under the former decisions of this Court, and likewise by other courts operating under similar rules, citing authorities in support of their statements, to which we would respectfully call the attention of this Court.

Assignments of errors merely stating that the judgment of the court below is contrary to the evidence or to that effect is universally held to be insufficient:

Clear Creek Gold Co. vs. Root, 1 Colo. 374.
Robins vs. Magee, 96 Ind. 174.
Nading vs. Elliott (Ind.) 36 N. E. 695.
Keokuk Stove Works vs. Hammond, 63 N. W. 563.
International Railway Co. vs. Hinzie, 18 S. W. 681.
Gilberson vs. Miller Min. Co. (Utah) 5 Pac. 699.

Connor vs. Edwards (S. C.) 15 S. E. 796.

Assignments of error to the effect that the evidence does not sustain the judgment or findings of the court are also held uniformly to be insufficient.

Grand Trunk Railway Co. vs. Ives, 144 U. S. 415.
Bass vs. Baker (Mont.) 12 Pac. 922.
Green vs. Gibson (Tex.) 18 S. W. 494.
Spotts vs. Hanley (Cal.) 24 Pac. 738.

It has been the settled rule of this Court that it will adopt the construction and interpretation of the State courts where the meaning or intent of a State's statutes are under consideration, and this Court will not interpret it differently even though it might not agree with the interpretation thereof by the State courts.

Walker vs. State Harbor Com., 17 Wall 648.
Elmendorf vs. Taylor et al., 10 Wheaton 152.
Central Land Company vs. Lindley, 159 U. S. 103.

There is no reason why the same rule should not apply to the interpretation of the rules of practice formulated by State or Territorial courts. They certainly are able to judge of the meaning and intent of their rules of practice and their interpretation of such rules, should be adopted in this Court.

This Court as well as courts of last resort of the States have held that they will refuse to review the decision of a court upon the enforcement or waiver of its rules of practice, except where the rules themselves are in violation of the legal rights of the party appealing. But where the rules are framed in accordance with the exercise of sound discretion and with due regard to their reasonableness, the enforcement of such rules are peculiarly within the discretion of the court making them and the exercise of such discretion will not be reviewed.

See Life Ins. Co. vs. Francisco, 17 Wall (U. S.) 672.

Also in the case of Caples vs. the Central Pacific R. R. Co., reported in the 6th Nevada, star page 265, on 276, where the Court says:

"Rules of court are generally made as much for the convenience of the court as for any other purpose. The courts usually have the power to adopt any rules not in conflict with law. Where they have done so, and they are reasonable, and there appears to be no legal objection to them, there should be no interference by any appellate tribunal with their enforcement. If rules be adopted for the convenience of the court, we apprehend that the court itself has some interest in enforcing them, and may or may not allow counsel to waive their requirements. . . . . We do not feel authorized to interfere with the courts in enforcing their own rules, the rules themselves being legal."

The same conclusion has been arrived at in the following cases, which we submit to this Court:

Lightle vs. Ivancovich, 10 Nevada, 41.
Hagar vs. Mead, 25 California 600.
Funkhouser vs. How, 18 Mo. 47.
State vs. Smith, 44 Mo. 112.
Martine vs. Lowenstine, 68 N. Y. 456.
Wickersham vs. Russell, 51 Pa. St. 71.
Gannon vs. Fritz, 79 Pa. St. 303.
Carpenter vs. Thayer, 15 Vt. 552.
Dolan vs. Stone, 65 Pac. 641.

The cases above cited also clearly establish the fact that the enforcement or waiver of the rules of court are mere matters of discretion, and this Court has repeatedly held that matters of discretion can not be brought here by appeal and will not be reviewed by this Court.

Ayers vs. Watson, 137 U. S. 584.
Bamberger vs. Terry, 103 U. S. 40.
Bullitt Co. vs. Washer, 130 U. S. 142.
Central Trust Co. vs. Grant Locomotive Works, 135 U. S. 207.

We therefore contend that the decision of the Supreme Court of the Territory upon the enforcement of its rules were matters resting wholly within the discretion of that court and are not reviewable in this Court by appeal.

The findings of fact certified to by the Supreme

Court of the Territory to this Court, sets out its rule of practice in regard to the assignment of errors of the trial court. The statement of facts also finds that the appellant did not comply with such rule, setting out the reasons for such a finding, and upon such finding of facts concludes that the court was compelled to affirm the judgment of the court below.

The opinion of the court below (the Supreme Court of the Territory, which sets out the assignment of errors) taken together with its findings of facts embodied in its statement of facts certified to this Court can not fail to support the judgment rendered upon such findings of fact. There was practically nothing before the court which it could review except the record, which the court examined for manifest errors and it finds that there are none. There being no errors apparent on the face of the record, and there being no proper assignment of errors before it, the Supreme Court of the Territory could not do otherwise than affirm the judgment of the court below.

It is therefore respectfully submitted that the court below did not err in rendering its judgment of affirmance, and that the judgment of the Supreme Court of the Territory of Arizona should be affirmed.

C. F. Ainsworth

Attorney for Appellee.

# Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 25.

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JOHN M. WARD, Appellant,

*vs.*

MOSES H. SHERMAN and DAVID HARDENBERG.

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This supplemental brief is occasioned by the fact that appellee's brief was written and filed herein April 14, 1903, on the belief that appellants' brief would be confined to the assignment of errors by him alleged on pages 100 and 101 of the record, but on receiving appellants' brief on April 27, 1903, I find they have argued the case on a different theory than contemplated by appellee, hence this supplemental brief in reply thereto.

The case, on its merits, is a very simple one. The undisputed facts in the case are as follows:

On September 12, 1894, the appellant, John M. Ward, held two notes for $12,500 each, one due October 1, 1894, the other October 1, 1897, each drawing interest at the rate of eight per cent. per annum, interest payably annually, and upon which the interest had been paid to October 1, 1893, and nothing was due on either note until October 1, 1894; both notes were signed by David Hardenberg, and their payment guaranteed by appellee Sherman. These notes were secured by a chattel mortgage executed by David Harden-

berg on a certain band of cattle running on what was known as the Sunflower range, in Maricopa County, Arizona, and for which the notes and mortgage were given to appellant for a portion of the purchase price thereof (Rec., pp. 18, 19, 9, 10, 11). This chattel mortgage provided that in case of default in payment of interest on said notes that the appellant or his assigns could take possession of the mortgage property and sell the same at public auction after giving twenty days' notice and apply the proceeds on the payment thereof (Rec., p. 10). After the notes and mortgage were given, all the property was conveyed by Hardenberg to the Sherman-Hardenberg Cattle Co., subject to the mortgage, of which company Sherman was the principal owner, and thereafter the property was conveyed to the appellee, Sherman (Rec., pp. 67 and 68).

On September 12, 1894, a proposition or agreement, signed by Sherman as president of the cattle company, was submitted to appellant Ward to turn over to Ward all the personal property and real estate purchased by Hardenberg of Ward on condition that he, Ward, deliver up and cancel the two notes and mortgage aforesaid (Rec., pp. 19 and 20), the cattle company having only possession of certain real estate, the title thereto then being in Ward (Rec., p. 50). This proposition was afterwards attempted to be accepted (Rec., p. 23).

On September 29, 1894, appellant Ward took possession of the property on condition that he surrender the notes aforesaid and cancel the mortgage, securing payment of same (Rec., p. 39). On October 8, 1894, a bill of sale was made of some personal property not included in mortgage (Rec., p. 21). No other conveyances or transfers were made to Ward of any of the property except upon the conditions aud as above stated.

On November 28, 1894, Ward then being in possession of

the mortgage property, filed a suit in the District Court of Maricopa County against Sherman and Hardenberg on the $12,500 note aforesaid due October 1, 1894, setting out the note in full in the complaint and praying judgment thereon for $1,500 (Rec., p. 1). On June 12, 1895, appellant Ward filed an affidavit for an attachment for balance due on said note as aforesaid. No attachment, however, was every issued, and the summons was not placed in the hands of the sheriff for service until May 6, 1899, after the second note became due, and on May 6, 1899, was served on appellee Sherman and no service was ever made on the defendant Hardenberg and he did not appear in the case (Rec., p. 12).

The appellee answered, admitted the execution of the note in question and alleged the execution of the second note, and that both of said notes were in possession of appellant Ward and both unpaid. The answer of Sherman by way of counter claim set up that he was the owner of all the property hereinbefore mentioned subject to the mortgage aforesaid and upon which he alleged to be due $25,000 and interest less such amounts as had been received by Ward from sales of portions of said property, and prayed that he be allowed to pay on said indebtedness and redeem said property, (Rec., pp. 5, 6, 7, 8, 10). No reply was filed to the counter claim and on this state of the pleadings the case was tried by the district court, without a jury, neither party demanding a jury.

Appellant on the trial introduced the $12,500 maturing October 1, 1894, *and rested his case* (Rec., p. 78); both notes were presented on the trial by appellant at request of appellee (Rec., p. 80). Judgment was rendered by the trial court for the appellee Sherman and that judgment affirmed by the Supreme Court of the Territory (Rec., pp. 25, 26, 30, and 88, 89).

## ARGUMENT ON MERITS.

1. The contract between appellant and the Sherman-Hardenberg Cattle Company (Tr., pp. 18, 19), by which appellant was to take back the property and cancel the mortgage and turn over the notes to Sherman and Hardenberg, was an entire contract, and the breach of any part of it was a breach of the whole, and abrogated the contract, leaving the parties to it, or their successors in interest in the same position as if the contract had never been made. Appellant's action in not canceling the mortgage, and in not turning over the notes, and in bringing suit on one of the notes, was a violation of this contract, and abrogated it entirely.

2. Appellant being in possession of the property, and the contract under which he went into possession being abrogated, and the parties in *statu quo*, appellant was holding the property as a mortgagee in possession and was subject to all the liabilities of a mortgagee in possession.

3. A mortgagee in possession of property, before foreclosure, is liable to have the property redeemed at any time and on such redemption is liable to the mortgagor for the profits of the property; and, if the property is at any time sought to be redeemed by the mortgagor, or his successors in interest, any profits that may have accrued in the meantime must be applied by the mortgagee on the mortgage debt; and any surplus above the mortgage debt must be turned back with the property itself to the mortgagor, or his successors, who have redeemed.

4. In this case, the appellee Sherman was really the mortgagor of the property, though it was held in another name; and in any event he is the successor in interest of the mortgagor, and owns all the rights of redemption.

5. An accounting was made by the court and appellant allowed all he claimed $25,000 principal, $12,333 interest from October 1, 1893, his entire expenses claimed for those years $16,000, making a total of $53,333, and therefore was not injured by the decree of the trial court.

1. We will consider the first proposition, that this contract was an entire contract, and appellant having failed to carry out his part of the agreement, the contract was abrogated entirely.

This contract was an entire contract; each part of it was common to the other, and interdependent upon it. The property was to go back to the appellant upon consideration of his canceling the mortgage and returning to Sherman and Hardenberg the notes on which Sherman was liable. Except such as had been sold since September 1, 1894, and for that the company should account.

Am. & Eng. En. of Law (2nd Ed.), Vol. 7, p. 95.

> "A contract is entire when by its terms, nature, and purposes it contemplates and intends that each and all of its parts, material provisions and the considerations, are common each to the other and interdependent."

> "If the contract is for the sale of several distinct things, but all for one consideration, it is entire."

Haslack *vs.* Myers, 26 N. J. L., 284.

> "A contract to trade a grocery stock for land, stock and notes, is entire."

There could be no question about the contract in the present case being entire; but the few authorities are cited to make assurance doubly sure.

The contract, then, being an entire one, the rule of law is that a breach of any part of it nullifies the whole con-

tract, and it may be treated by the other party as entirely at an end, and just as if never made.

Am. & Eng. En. of Law (2nd Ed.), Vol. 7, p. 150.

> "If the contract is entire, a breach as to a single material point discharges the whole, relieving the other party from performance and affording him an immediate right of action to enforce the whole obligation."
>
> Cockley *vs.* Brucker, 54 Ohio St., 214.

This principle of law is also so well defined and clear that it is unnecessary to cite more authorities upon it.

It follows, then, that as the contract between Ward and the Sherman-Hardenberg Cattle Company by which Ward was to go back into possession of the property, and cancel the mortgage and return the notes to Sherman and Hardenberg for which Sherman was liable, was an entire one; and as Ward has broken it in a material part by failing to cancel mortgage or to return the notes and by bringing this action on one of the notes, Sherman, for whose benefit the contract was made, could treat that contract as entirely nullified, and proceed to redeem the property, just as if he had never agreed that the mortgage should be canceled and Ward go back into possession and ownership of the property.

It makes no difference that appellant claims that part of the property contracted to be turned over to him was not turned over. (As a matter of fact, the Desert Wells property, for which he got $500, was turned over to him, although it was not included in the contract.)

If all the property had not been turned over to him, the appellant had the option, first, to take what was turned over to him, carry out his part of the contract by canceling the mortgage and turning over the notes, and then suing the Sherman-Hardenberg Cattle Company for the proceeds

of sales made by it after September 1, 1894, if the proceeds of any such sales were not accounted for as provided in the contract of September 12, 1894 (Transcript, p. 19), (as that contract expressly contemplated that some of the stock cattle had been sold subsequent to September 1, 1894, and this was to be accounted for by the Sherman-Hardenberg Cattle Company, but the notes were to be delivered and the mortgage canceled on the delivery of the property contemplated by the contract, viz: that not sold after September 1, 1894;) or, second, to repudiate the contract and bring suit to foreclose the mortgage, and recover personal judgments against Hardenberg, the maker of the notes, and Sherman, the guarantor. Appellant might have pursued either one of these courses, and been strictly within his rights, and obtained relief for any wrong done him. But he did not pursue either. He adopted a third course, which was to repudiate the contract after getting in possession of the property, as his mortgage provided that when the notes or interest were due and unpaid he could take possession of the property. One note being due he brought suit on it, holding the other, not then due, until the trial of this action, when they were both produced in court as unpaid.

In other words, the plaintiff, by this suit, has unqualifiedly repudiated the contract of September 12, 1894, and treated it as abrogated; because he held the notes and mortgage as legal owner; he brought this suit upon the first note, upon the legal liability shown by it, against the makee and guarantor (Tr., p. 1); and still holds the other note.

The colloquy between counsel and court, on the trial (Tr., pp. 40, 41 and 42), shows the exact situation as claimed by appellee, and admitted by appellant; that the claim made by plaintiff, and the only claim in the suit, by pleading and proof, was the first note of $12,500; that after introducing

the note the plaintiff rested his case (Tr., p. 42). "Mr. KIBBEY: That is our case, if your Honor please."

It seems to us absolutely beyond question that appellant in pursuing this course repudiated and abrogated entirely his contract, and placed the parties in the same position as if it had never been made. This being so and the contract being abrogated, the question arises what were the respective rights and liabilities of the parties, and this brings us to consider our second proposition.

2. Appellant taking possession of the property, and the contract under which he went into possession being repudiated and abrogated by him, and the parties in *statu quo*, appellant was holding the property as a mortgagee in possession, and subject to the liabilities of such a holding.

Appellant held only a mortgage on the property. The mortgage had not been foreclosed, and therefore was still subsisting only as a mortgage.

The mortgage was to be canceled and the notes returned by the appellant. This was not done, and never has been done, and is now expressly repudiated by appellant, so that the mortgage never was cancelled and is still in full effect, and has so been all the time.

As this is important, let us put it another way.

As found by the trial court in the "Findings of Fact," etc. (Tr, p. 27), plaintiff below held both notes and the mortgage uncanceled and was insisting upon his rights as legal holder of unpaid notes.

"That the contract of September 12, 1894, was never carried out by plaintiff, but that he took possession of all the property of the Sherman-Hardenberg Cattle Co. about October 1, 1894; that he never turned over, delivered or canceled said notes or either of them or satisfied or discharged the chattel

mortgage securing the same, and that, on the contrary, he brought suit on one of the notes for the collection of a portion that he claimed to be due thereon."

In that state of case, not only "found" by the trial court, but never questioned in this record, where was the *legal title* to the property?

Unquestionably, in Sherman.

What rights had Ward in the cattle?

Equally certain, those of a lienholder, under his mortgage, for the legal title of Sherman could not be divested, except by foreclosure of the mortgage.

Therefore, it is apparent that Ward was not in possession of the property in any other way, or under any other title, than as a mortgagee in possession.

This leads us to a consideration of the rights and liabilities of a mortgagee in possession.

*3. A mortgagee in possession of property is liable to have the property redeemed at any time and on such redemption he is liable to the mortgagor for the profits; and if the property is sought to be redeemed by the mortgagor, or his assignee, any profits that may have accrued in the meantime must be applied by the mortgagee on the mortgage debt; and any surplus above the mortgage debt must be turned back with the property to the mortgagor, or his successors, who have redeemed.*

If the mortgage has not been foreclosed the mortgagee who is in possession is so in possession simply to protect the security for his debt, and his duty is to take care of the property, and to apply it on his mortgage debt. For any excess of profits he is liable to the mortgagor. And if the latter seeks to redeem, the mortgagee in possession must render an account of the profits, and apply them on the mortgage debt.

The following authorities will fully support these propositions:

Cobbey on Chattel Mortgages, par. 1027:

"A mortgagor of chattels, or those who claim through him, as his creditors, may redeem the property by paying the mortgage debt at any time after it is due, and before sale. * * * A purchaser from the mortgagor acquires his right of redemption." (Citing Scott *vs.* Henry, 13 Ark., 198.)

Brink *vs.* Freoff, 40 Mich., 611:

"A mortgagor of chattels or claimants under him, such as his creditors or assigns, have the right to redeem the property by paying the debt when due and before sale."

Wilson *vs.* Brannan, 27 Cal., 259:

"The mortgagor of personal property has an equity of redemption in the mortgage property after the conditions of the mortgage are broken, which he may assert by paying the debt and redeeming the property at any time before this equity of redemption has been cut off by a foreclosure or sale at auction."

Herman on Chattel Mortgages, par. 194:

"* * * And even where the mortgagor, in accordance with the terms of the instrument, delivers possession of the property to the mortgagee after breach of condition, it will not vest the absolute ownership in the mortgagee or free it from the mortgagor's right of redemption. * * * If the mortgagee take and retain possession of the mortgaged property, the property is always liable to redemption. When the mortgagee's debt is satisfied, his title ceases, and before the right of redemption is barred, the mortgagor has an assignable interest.

Strang *vs.* Allen, 44 Ill., 428:

In this case, there were two mortgages of the property. The prior one was foreclosed, without making the junior one a party, and the prior mortgagee went into possession (or rather his assignee). The junior one then sought to redeem, and was allowed to do so; and it was held that the prior mortgagee, having gone into possession under a foreclosure which was void as to the junior mortgagee, had the status merely of a "mortgagee in possession" and therefore was liable for the rents and profits during the time he was in possession, and that these profits should be applied on his mortgage debt. The court said in part:

> "They (the prior mortgagee), however, obtained possession of the premises and received rents and profits from the use of the property; and only being in possession as assignees of Chamberlain's mortgage, they were in possession precisely as if the mortgagee had entered under his mortgage. *And a mortgagee in possession is always liable to account for the rents and profits received over and above necessary repairs and taxes.*
>
> "Plaintiffs in error, representing the mortgagee while in possession, were liable to thus account for the rents and profits. * * * They should be charged with the rents and profits of the property received by them, after deducting all reasonable charges for repairs and for taxes and assessments paid on the property."

This case cited is a case where the mortgagee was in possession under a foreclosure; but as it happened the foreclosure was not binding against a junior mortgagee. Therefore, it was held as to him that the first mortgagee was merely in the position of a mortgagee in possession, and liable to account for the rents and profits.

The analogy to the present case is very strong. In the case at bar, the mortgagee is in possession by consent of the assignee of the mortgagor under a contract; but, as it hap-

pens, by his own failure to perform his part of the contract; by repudiating her agreement, and insisting that the notes still stand as a legal claim against the maker and guarantor, and bringing this suit upon the note, the mortgagee has failed to cut off the equity of redemption of the mortgagee or its assigns (just as in the case cited, by a failure in the foreclosure proceedings to include the junior mortgagee, the prior mortgagee failed to secure the full legal title); so that in this case it is equally plain that the mortgagee should be held to be merely a mortgagee in possession, and should be held liable for the profits, which should be credited on the amount which the mortgagor now will have to pay to redeem.

Another case to the same effect is

Long *vs.* Richards (Mass.), 48 N. E., 1083:

In this case there were two mortgages. The first mortgage was foreclosed; but in the notice of sale the property was stated to be subject to large mortgages; this was not true. The holder of the first mortgage bid the property in. After he had held it for some time, the junior mortgagee sought to redeem it; and he was allowed to do so, the court holding that the foreclosure was voidable by him. The court also held that he was entitled to an accounting from the first mortgagee, and that all rents and profits received by the first mortgagee while in possession should be credited on the amount necessary to redeem. The court said in part:

> "But when we are bound, however much we may hesitate in our belief, to assume bad faith on the mortgagee's part throughout the whole transaction, we cannot say that the master erred in holding him liable for what he might have made by reasonable diligence.

> "The same answer may be made when it is argued that the defendant, having sold the premises, and bought them in at the foreclosure sale, was holding as owner, and supposed himself to be the owner, owing no one any duty of diligence, and therefore should not be held to account for more than he actually received. If he had practiced a wrong on the plaintiff, the fact that he supposed his wrong to be effectual gives him no equity. It still is true, that, in contemplation of law, he was not the owner, and had no honest reason to think that he was if he did so. His own title to possession as against the plaintiff was as holder of a prior mortgage, and he must account according to his title."

This was a much stronger case than the present one. Here the mortgagee was in poseession under good "color of title," as there had been a foreclosure of the property and sale to him. But the sale was voidable by the junior mortgagee, because the notice of sale had stated falsely that there were other heavy mortgages against the property. Therefore, although the first mortgagee claimed to hold as owner, the court held that he, having wronged the junior mortgagee, could only hold as mortgagee in possession. The defendant did not even dispute that he was liable for the profits he had actually received; but only that he was not answerable for what he might have made by reasonable diligence. But the court held not only that he was accountable for what he had actually made, but also for what he might have made with due diligence.

In the present case, the mortgagee not only has wronged the mortgagor by taking possession and then failing to keep his contract, but he is in possession without even a colorable title.

Another case is

Swegle *vs.* Belle *et al.* (Oregon), 25 Pac., 633.

In this case a deed absolute on its face had been given as a mortgage really to secure the payment of money.

The plaintiff, alleging this fact, brought suit to redeem.

The fact was proved by parol testimony, on the trial.

Then the plaintiff demanded that the amounts of the rents and profits that the defendant received from the land, during his occupation, should be credited on the mortgage debt necessary to redeem.

The court held that, as the defendant held possession merely as a mortgagee in possession, he was liable for the rents and profits. And it also held, that as the amount of these rents and profits were uncertain, until the defendant accounted, the plaintiff need not make any tender in order to redeem.

Here is the same point decided, that the mortgagee in possession must account to the mortgagor for the rents and credit them on the mortgage debt; and the additional point that the plaintiff need not allege a tender. This would necessarily be true, as the court says, for he does not know what the amount which he is entitled to be credited is until an accounting is had.

From the authorities cited there can be no question but that a mortgagee in possession of the mortgaged property, before foreclosure, or, in fact, unless he has the actual legal title in himself, must account to the mortgagor, when the mortgagor seeks to redeem, for the rents and profits he has received, and credit them on the mortgage debt.

There can be no question, either, both on principle and from the analogous cases cited, that the appellant in this case is in just the position of a mortgagee in possession.

The appellee had a perfect right to waive the irregular method in which the property was sold by appellant, and

hold appellant as trustee of the price received, beyond the amount necessary to pay the mortgage indebtedness.

Lea *vs.* Fox, *supra.*
Davenport *vs.* McChesney, 86 N. Y., 242.
Jones on Chattel Mortgages, Sec. 696.
Martin *vs.* Jenkins *et al.* (S. C.), 27 S. E., 947.
Metzler *et al. vs.* James (Col.), 19 Pac., 885.
Mowry *vs.* Bank (Wis.), 11 N. W., 247.
Wann *vs.* Coe, 31 Fed., 369.

4. Appellee Sherman is the legal owner of the right to redeem this property.

This is shown by the testimony of the appellee Sherman at pages 67–68 of the Record, where he testifies that all the interest of David Hardenberg and the Sherman-Hardenberg Cattle Company in this property had been assigned to him.

Furthermore the evidence shows throughout that Sherman was the real purchaser of the property, the one who laid out all the money on the property, and the one for whose benefit the purchase and mortgage back to appellant was made. This being so, the well established rule would apply, that a party for whose benefit a contract is made may claim under it and enforce it in any manner.

Am. & Eng. En. of Law, Vol. 3, p. 863, and cases cited.

The mortgage contract having been made for the benefit of Sherman, he can redeem from that mortgage.

5. The accounting asked for in this case was only incident to the right of relief vested in appellee under the facts as shown by the record, the taking of which by the Judge himself was complete and clearly authorized by law. The following case is directly in point on this proposition.

Emery *vs.* Mason (Cal., 1888), 16 Pac., 894:

> "It is insisted by appellant that, notwithstanding the findings, the superior court should have ordered an accounting; that the only way in which it could be ascertained that Charles G. Mason did not make or receive any advantageous benefit from the money, tools and provisions supplied to him by the plaintiff was by an accounting. But, as the court found nothing was acquired during the prospecting tour, there was no necessity for a decretal order referring the cause for the taking of an account. *Moreover, when an accounting is prayed, the court may itself take or state the account;* and it would be difficult to state one in the present action more clearly than by ascertaining and declaring upon the evidence that there was no profit, return, money, or property acquired by the deceased under the contract set forth in the complaint, to be charged against his estate."

This case is an exact authority for the contention of the appellee in the case at bar, and we believe clearly states the reasonable doctrine on this point.

Other cases which hold that the court itself may on the trial examine into the state of the accounts and state the account itself, without making an interlocutory order for an accounting are the following:

Jewett *vs.* Cunard (Circuit Court, District of Maine), Federal Cases, No. 7310, Vol. 13.
Wheeler *vs.* Billings, 72 Fed. Rep., 301.
Pierce *vs.* Thompson, 23 Mass., 193, 196.

The trial court rendered its accounting on the statement of appellant over his own signature for the years 1895, 1896, 1897 and 1898, and for 1899 it is based partly on appellant's statement and other witnesses, giving appellant full credit for all he claimed, allowing him his $25,000 principal and interest at 8 per cent. from October 1, 1893, to date of trial,

amounting to $12,333; also $3,200 for each year for five years, amounting to $16,000, which, as stated by appellant, included all expenses (Rec., pp. 22 and 23). Appellant was a witness in his own behalf, and also for appellee, and nowhere does he state that the statement made by him on April 18, 1899, was not absolutely correct in every particular, and so far as we are advised no one has ever claimed that appellant's statement was not correct.

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Noticing the brief of appellant, the first point presented is, that the counter-claim by defendant below was improperly considered by the trial court.

Before discussing the legal phase, it should be noticed that the complaint by plaintiff counted on the legal liability of the defendant upon an unpaid promissory note (Tr, p. 1).

The answer was duly and regularly filed; admitting the residence of parties as alleged; admits the making and guaranty of the note as claimed; and then alleges not only the defense to the note, but defendant's claim to a judgment over because of transactions stated directly connected with and by the acts of the parties made part of the legal relations of both to the note sued on.

Technically it was called and was a "counter-claim."

We shall insist it was perfectly regular; but it was the pleading of the defendant; it was not objected to by plaintiff in the trial court; no demurrer, or exception was filed to it; the cause was tried upon the merits under it; the evidence offered by defendant under it and by plaintiff as to it, was received by the court, without objection made by plaintiff.

No point was made as to it in the motion for new trial in the district court (Tr, p. 24).

Nor was the regularity of the pleading questioned in the supreme court of the Territory, and therefore cannot be, for the first time, properly raised here.

But on the merits of the question, the appellant raises the point that the complaint stating merely a law action, the counter-claim seeking equitable relief should not have been allowed.

None of the sections of the Revised Statutes of 1887 cited by appellant in his brief on page 14 have any bearing on the subject one way or another, they all being applicable to particular kinds of actions, or do not affect the question at all.

Section 741 of the R. S. 1887 (Arizona) alone is sufficient to sustain the granting of equitable relief upon a counter-claim to a law action. It must be remembered that the note sued on was one of series given in conjunction with a mortgage of certain property securing the payment of such notes. When the suit was brought on the note, there was either of two courses open for the appellee, who was not only surety on the notes but also successor in interest to the mortgager of the mortgaged property. First, he could pay the note and all unpaid balances due on the mortgaged debt and thus redeem the property from the mortgage and demand an accounting by a separate suit; or second, he could in the suit upon the mortgage debt demand an accounting and apply the amount realized by the mortgagee in possession upon the sale of part of the mortgaged property, upon the mortgage debt, and upon such application of such funds redeem the property from the mortgage and secure the payment to him of the overplus, by the mortgagee. In either event the cancellation and surrender of the notes would have been incidental relief inasmuch as the mortgaged debt was evidenced by the notes, and the payment of such debts would be a discharge of the liability on the notes. It is

very evident that inasmuch as the appellee's liability on the notes was limited to the amount actually due the payee and mortgagee, the accounting for moneys derived by the mortgagee while in possession of the property and retained by him (which either fully or partly paid the debt existing on the notes) is certainly "incident to" and "connected with" plaintiff's cause of action.

While it is true that the relief prayed for in the counter-claim might have been secured in a separate equity suit, the general authority of Section 741 R. S. (Arizona), 1887, above referred to permits the adjustment of all differences between the parties, where they have an incidental relation or some connection with the plaintiff's cause of action. Under the provisions of this section the counter-claim need not "grow out" of plaintiff's cause of action, as is the rule of some of the States, but a mere incidental relation or connection to it, so much so that an adjudication of the one would affect the other, is sufficient. The notes are but mere evidences of the mortgage debt; the payment of the one extinguishes the other. Where the claim is that the mortgagee in possession has already paid himself the full amount or even part of the mortgaged debt and to that extent discharged the makers and sureties on the note, such claim is incidental to and connected with the plaintiff's claim on the notes inasmuch as plaintiff's right to recover on the notes is materially affected thereby and under Section 741 such claim should be and could be shown and the differences of the parties adjusted in one suit.

While it is true Chapter 48 of the Laws of 1877 of Arizona was repealed by Section 3257 of the Revision of 1887, yet, a new provision was made for the same purpose and is contained, substantially, in the following section:

> Sec. 653. "The pleadings in all civil suits in courts of record shall be by complaint and answer."

Sec. 793. "The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief to which he may be entitled either in law or equity."

It follows from the above sections that the legislature very plainly expressed their intention to disregard the distinction between suits in equity and actions at law, not only as to the mode of bringing them before the court, but also in the granting of relief, and provided that all actions should be brought in the same manner and also that the same court may in the same action give either legal or equitable or both kinds of relief according to the demands of the occasion.

The procedure and pleadings in the lower court are beyond objection. It is not only reasonable and desirable as to result, but they are free from complications, and in view of the section above cited, there can be no valid objection thereto. By this method, we avoid bringing a separate suit for an accounting and redemption, which, as it necessarily would have been between the same parties and bear upon the amount recoverable upon the note, could, and no doubt would, have been consolidated and tried together or in conjunction, under the authority of Sections 741 and 918 R. S., Ariz., 1887, and the decree and judgment framed according to the equities of the parties in both suits. Section 741, above referred to, is a general one, regarding counter-claims, and makes no distinction between equitable and legal counter-claims, but limits them to such as are incident to or connected with plaintiff's cause of action. The cause of action, or rather, counter-claim of the appellee, coming as it does so clearly within the provisions of that section, we cannot understand the force of appellant's contention, and we respectfully submit that the objection is unfounded and not worthy of even serious thought.

But be that as it may, we submit that it is a rather late day to raise such a technical objection, based upon alleged irregularities in the pleadings. First, because of the provisions of Section 673, R. S., Arizona (1887), which is as follows:

> "The court shall in every stage of an action disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

Under this provision the district court itself could not reverse the judgment, even admitting that the contention of the appellant is sound and correct, and this Court ought, therefore, not interfere and do that which the court below was strictly enjoined by the legislature from doing.

Second, because this Court has so often held that all matters of procedure and pleading in the lower courts are within the discretion and control of that court (except where the constitutional rights of the parties are concerned), and the exercise of such discretion will not be reviewed by this Court. Whether or not the actions were properly submittable at the same time, or should have been separated, is a mere matter of procedure, and there being no provisions of law to prohibit it, the Court either could have permitted the pleadings to stand as they were or forced the counter-claim out of the case, and appropriate proceedings could have been begun in time to reach the result desired, to wit, a complete adjustment of the questions involved. But that question was not raised until the matter was brought before this Court; the parties proceeding to trial and judgment and to judgment of the supreme court of the Territory without raising that question, and we submit that the objection of the appellant is too late to receive the attention of this Court. This Court had time and time again decided that points which were

not raised in the court below cannot for the first time be raised in this Court, and we submit that inasmuch as neither the trial court's attention was called to this point, nor that of the supreme court, and some action taken at such time, the objection of the appellant on this matter of mere practice is not reviewable and should not be considered at this time.

In the case of Robinson *vs.* Belt, 187 U. S., 41, this Court in the course of its opinion said (on page 50):

> "It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. * * * While it is the duty of this Court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this Court has evolved from the record. It is not the province of this Court to retry these cases *de novo*."

This Court expressed itself similarly in the following cases:

Ankeney *vs.* Clark, 148 U. S., 345.
Alexander *vs.* U. S., 355.
Street Railway *vs.* Hart, 114 U. S., 654 on 662.
Marine Bank *vs.* Fulton Bank, 2 Wall., 252.
The Caroline, 9 Wheaton, 386.

We therefore submit that this point raised by the appellant is not only without merit, but at this late day is not entitled to any consideration.

As to the various assignments of error in appellant's brief, we desire to say that had they been assigned in the court below they would have no doubt received the consideration due them, but they all raise questions not determinable at this late day nor by this Court.

## CONCLUSION.

It is clear from the record in this case that the appellant has in this judgment recovered not only his entire debt, but he has recovered also all of his costs and expenses. Yes, even more than this. The trial court was more than generous to the appellant, for the rule of law is well settled that whenever a mortgagee in possession disposes of property enough to pay off his mortgage, then his title to the remainder of the property ceases. (Freeman *vs.* Freeman, 17 N. J. Eq., 44.) Had this rule been applied in this case to the appellant, the appellee's judgment would have been for considerably more; but the court allowed the appellant interest on $25,000 up to the date of the trial. The interest should have only been allowed to the time the appellant had sold and disposed of enough property to pay the mortgage debt, which was nearly a year and a half before the trial.

The appellant not having been wronged in the slightest degree, and having received all of his principal, interest and expenses, it is no more than fair and equitable that the party who made this possible, and who has expended large sums of money (over $20,000) in the improvement of this ranch and property, should have returned to him at least a portion of it.

We therefore submit upon the record in this case, and the authorities cited, that the judgment of the lower court should be affirmed.

Respectfully submitted,

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